No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,
v.
MARIA T. VULLO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; MANHATTAN INSTITUTE; ALABAMA POLICY INSTITUTE; AMERICAN FAMILY ASSOCIATION ACTION; AMERICANS FOR LIMITED GOVERNMENT; GARY L. BAUER, PRESIDENT, AMERICAN VALUES; CHARLIE GEROW; CATHOLICS COUNT; CATHOLIC VOTE; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION; CITIZENS UNITED; CITIZENS UNITED FOUNDATION; CONSERVATIVE POLITICAL ACTION COALITION; EAGLE FORUM; FAMILY COUNCIL IN ARKANSAS; GLOBAL LIBERTY ALLIANCE;
(*Brief Title continued on inside cover*)

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January 15, 2024

INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; MEN AND WOMEN FOR A REPRESENTATIVE DEMOCRACY IN AMERICA, INC.; TIM JONES, MISSOURI CENTER-RIGHT COALITION; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NEW JERSEY FAMILY POLICY CENTER; MOUNTAIN STATES LEGAL FOUNDATION; NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW; PALMETTO PROMISE; PROJECT 21 BLACK LEADERSHIP NETWORK; RIO GRANDE FOUNDATION; SETTING THINGS RIGHT; 60 PLUS ASSOCIATION; STRATEGIC COALITIONS & INITIATIVES, LLC; TRADITION, FAMILY, PROPERTY, INC.; UPPER MIDWEST LAW CENTER; WISCONSIN FAMILY ACTION; WOMEN FOR DEMOCRACY IN AMERICA, INC.; AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. AAF has an interest in the continued freedom of organizations to advocate for their beliefs, whether political, social, or otherwise, without fear of government retaliation.[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI's constitutional studies program aims to preserve the Constitution's original public meaning. To that end, it has historically sponsored scholarship regarding constitutional rights, quality-of-life issues, property rights, and economic liberty. MI scholars and affiliates have encountered unconstitutional restrictions on their speech and the institute consequently has a particular interest in defending speech rights.

Amici Alabama Policy Institute; American Family Association Action; Americans for Limited

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Government; Gary L. Bauer, President, American Values; Charlie Gerow; Catholics Count; Catholic Vote; Center for Political Renewal; Center for Urban Renewal and Education; Citizens United; Citizens United Foundation; Eagle Forum; Family Council in Arkansas; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; Men and Women for a Representative Democracy in America, Inc.; Tim Jones, Missouri Center Right Coalition; National Center for Public Policy Research; New Jersey Family Policy Center; Mountain States Legal Foundation; North Carolina Institute for Constitutional Law; Palmetto Promise; Project 21 Black Leadership Network; Rio Grande Foundation; Setting Things Right; 60 Plus Association; Strategic Coalition and Initiatives, LLC; Tradition, Family, Property, Inc.; Upper Midwest Law Center; Wisconsin Family Action; Women for Democracy in America, Inc.; and Young America's Foundation are organizations that believe in the importance of Freedom of Speech and Freedom of Association and which are concerned about government overreach that infringes on those rights.

INTRODUCTION

The purpose of the Constitution is to protect the rights of individuals from government officials who are willing to trample on those rights to accomplish their political goals. This case is an instance of such disregard for the rule of law in New York. Governor Andrew Cuomo and Maria Vullo, Superintendent of New York's Department of Financial Services ("DFS"), set out to undermine the ability of the National Rifle Association ("NRA") and other Second Amendment advocacy organizations to engage in the exercise of their rights of Freedom of Association and Freedom of Speech.

In 2017, New York's DFS opened an investigation into insurance programs offered by the NRA through third party insurance companies. *Nat'l Rifle Ass'n v. Vullo*, 49 F.4th 700, 706 (2d Cir. 2022) [hereinafter *NRA v. Vullo*]. Specifically, insurance policies offered through the NRA covered, among other matters, legal fees for those who used their gun in self-defense and were ultimately found to have violated the law in doing so. *Id.* at 718. Asserting that these policies were insuring against violations of the law, DFS claimed that the insurance policies themselves violated the law. *See id.* Some of these companies ultimately signed consent decrees and paid $13 million in fines. *Id.* With these investigations and consent decrees in the background, on April 19, 2018, DFS issued a press release in which Governor Cuomo said that, although "New York may have the strongest gun laws in the country," more needed to be done to "ensure that gun safety is a top priority for every individual, company, and organization that does

business across the state."[2] Governor Cuomo thus directed DFS to "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities," and that, "[t]his is not just a matter of reputation, it is a matter of public safety."[3] In the same statement, Superintendent Vullo said, "DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety."[4]

That press release was issued in conjunction with DFS's guidance memo, signed by Superintendent Vullo. Issued in response to the 2018 school shooting in Parkland, Florida, the guidance explained that the "social backlash against the NRA, and similar organizations that promote guns that lead to senseless violence . . . can no longer be ignored" and that "society, as a whole . . . is demanding change now."[5]

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[2] *Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations*, New York Dept. of Fin. Servs. (April 19, 2018), https://dfs.ny.gov/reports_and_publications/press_releases/pr1804181.

[3] *Id.*

[4] *Id.*

[5] Superintendent Maria T. Vullo, New York Dept. Fin. Servs., *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations*, (April 19, 2018),

Building on the charge that advocacy for the preservation and exercise of a constitutional right leads to the killing of children, the guidance went on to say that there is precedent for businesses acting to fulfill "their corporate and social responsibility. The recent actions of a number of financial institutions that severed their ties with the NRA after the AR-15 style rifle killed 17 people in the school in Parkland, Florida is an example of such a precedent."[6] Mere months after opening an investigation into insurers that worked with the NRA,[7] the DFS guidance concluded with an encouragement to "its insurers to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations" and "to take prompt actions to managing [sic] these risks and promote public health and safety."[8]

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https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180419_guidance_risk_mgmt_nra_NRA_similar_gun_promotion_orgs_insurance_industry.

[6] *Id*.

[7] *NRA v. Vullo*, 49 F.4th at 706 (noting that DFS had begun its investigation into "the legality of certain NRA-endorsed insurance programs" in October 2017).

[8] *Id*. One day after the issuance of the DFS guidance, Governor Cuomo said in a post on Twitter, "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." Andrew Cuomo (@NYGovCuomo), TWITTER (Apr. 20, 2018, 8:58 AM), https://twitter.com/NYGovCuomo/status/987359763825614848.

No government or government official should have the power to deprive a lawful organization of a full range of financial services without facing constitutional review. New York's actions in this case are inconsistent with the First Amendment's protection of Freedom of Association and Freedom of Speech and the Second Amendment Right to Bear Arms. Furthermore, New York's actions are contrary to the principle found in this and lower courts' precedent that government may not circumvent constitutional protections merely by crafty maneuvering or by engaging the help of third parties. If the Constitution's protections are to be more than mere "parchment barriers,"[9] courts must be able to review government action and speech that is intended to harm constitutionally protected interests even where it does not do so directly.

SUMMARY OF THE ARGUMENT

The Constitution exists to protect the rights of citizens from one another and from their governments. The incorporation doctrine of the Fourteenth Amendment asserts that the Constitution's protections apply to the several States. In this case, New York's Department of Financial Services ("DFS") overstepped its bounds when it used its regulatory power to encourage insurance companies and banks to sever ties with the National Rifle Association ("NRA") and other Second Amendment Advocacy organizations. The Second Circuit below reversed the district court's denial of DFS' motion to dismiss. For

[9] The Federalist No. 48 at 276 (James Madison) (Clinton Rossiter ed., 1999).

the following reasons, this Court should reverse the Second Circuit's decision and remand, giving the NRA the opportunity to present its case in court.

The actions of DFS in this case infringe on the NRA's right to free association. The Court has repeatedly recognized and continues to recognize the First Amendment's protection of Free Association. In this case, DFS's statements and regulatory action, taken together, are likely to have a chilling effect on Free Association in the state of New York, and to chill the NRA's associational interests specifically.

DFS may not hide behind prosecutorial discretion in this case. This Court's precedents in racial discrimination cases make clear that the Constitution's protections are not subject to crafty maneuvering by government officials. While the government need not prosecute every violation of the law, it may not selectively prosecute to indirectly accomplish unconstitutional goals.

Similarly, it is irrelevant that New York did not directly punish the NRA's speech or association by attacking its insurers and bankers. Government is not immune from constitutional review of its actions because they pass first through a private intermediary. In the Fourth and Fifth Amendment contexts and the state action context, this Court and lower courts have repeatedly held that the actions of a private entity may nonetheless be attributable to the government, and thus subject to constitutional challenge, if the government coerces or instigates the private third party.

Finally, DFS may not avoid review in this case on the grounds that it was engaging in protected government speech. Although governments and government officials may have and express their own views, that freedom is limited by other constitutional interests. Here, Superintendent Vullo used her speech and that of DFS as a tool to harm the interests of the NRA and other Second Amendment advocacy organizations in retaliation for their views and to impair the ability of like-minded individuals to freely associate. Such use of government power is outside the protection recognized by this Court.

This Court should reverse the Second Circuit's decision and allow the case to proceed.

ARGUMENT

I. The New York Government's Actions Here Unconstitutionally Harm the NRA and Other Second Amendment Advocacy Organizations' Right to Free Association.

New York's efforts to undermine the NRA and other Second Amendment advocacy groups' ability to operate violate the freedom to associate protected by the First Amendment. Association is an American tradition. As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike in aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn

to help each other freely."[10] Moreover, "[w]hen you allow [citizens] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose."[11] In America, "[t]he art of association then becomes . . . the mother science; everyone studies it and applies it."[12]

This American tradition was enshrined in the First Amendment. This Court has "long understood" the rights of Free Speech and Peaceable Assembly, and Petition in the First Amendment to imply "a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Such association "furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'" *Id.* (quoting *United States Jaycees*, 486 U.S. at 622).

This Court has recognized what de Tocqueville found Americans knew at the dawn of our Republic: "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *Ams. for Prosperity*

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[10] 3 Alexis de Tocqueville, *Democracy in America*, 898 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840).

[11] *Id.* at 914.

[12] *Id.*

Found., 141 S. Ct. at 2382 (internal quotation marks omitted) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)), and that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. at 460 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). Further, "'it is immaterial' to the level of scrutiny 'whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters.'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *NAACP v. Alabama*, 357 U.S. at 460-61). In this case, Governor Cuomo and Superintendent Vullo sought to undermine political diversity by squeezing organizations that advocate views with which they disagree out of the marketplace for financial services, and thus to squeeze those views out of the marketplace of ideas. Such an effort to impose ideological uniformity on the political landscape of New York is antithetical to the First Amendment's protections of association and speech.

The bar for constitutional review in Freedom of Association cases is low and was clearly exceeded in this case. The Court has held that in compelled disclosure cases, exacting scrutiny is triggered "by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect,' of disclosure." *Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (emphasis in original)

(quoting *NAACP v. Alabama*, 357 U.S. at 460-61).[13] Thus, courts are to be sensitive to government action that is harmful to free association. Here, there is no question that the state action "*may* have the effect of curtailing the freedom to associate." *Id.*

First and most obviously, the government's actions here harm the association interests of banks and insurance companies on the one hand, and the NRA and similar organizations on the other. Banks and insurance companies that operate in New York will reasonably believe that doing business with the NRA and other Second Amendment advocacy organizations will invite some form of retaliation by the State of New York. DFS "urge[d] all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public

[13] Although the Court has applied exacting scrutiny in the compelled disclosure context, here, strict scrutiny will be the more applicable standard. Justice Alito notes in his *Americans for Prosperity Foundation* concurrence that the Court's compelled disclosure doctrine largely developed before the Court's development of the strict scrutiny standard. *Ams. for Prosperity Found.*, 141 S. Ct. at 2391 (Alito, J., concurring). Justice Thomas argued in his concurrence in the same case, "Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights." *Id.* at 2390 (Thomas, J., concurring). Similarly, here, strict scrutiny would be the most appropriate test given the directly burdensome nature of the government's actions on the NRA and other Second Amendment advocacy organizations' freedom to associate.

health and safety."[14] Further, New York's DFS has already pursued regulatory enforcement action against organizations doing business with the NRA and is alleged, in at least one instance, to have offered lenience in exchange for that business's cessation of economic association with the NRA.[15] Clearly insurance companies and banks may dissociate from the NRA and other similar organizations not because those companies and banks are unwilling to do business Second Amendment advocacy organizations in principle, but because they are seeking to avoid becoming DFS's target. The chilling effect is obvious.

Further, New York's actions here harm the associational interests of the NRA and its members. Some NRA members in New York, seeing the pressure the government is placing on the organization, may conclude that it is in their interest to disassociate from

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[14] *Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations*, New York Dept. of Fin. Servs. (April 19, 2018), https://dfs.ny.gov/reports_and_publications/press_releases/pr1804181.

[15] Vullo, once in court "assume[d] in the alternative" that she had met with at least one insurance company and "offered leniency in exchange for help advancing her policy goals." *NRA v. Vullo*, 49 F.4th at 713. Specifically, she "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." *Id*. at 708] (alterations in original). Vullo explained how this insurance provider was violating New York law but told its representatives that it could "come into compliance and 'avoid liability' for its regulatory infractions, including by no longer 'providing insurance to gun groups' like the NRA." *Id*. at 708.

the NRA or other similar organizations. For example, a small or mid-size business owner could reasonably believe that while banks and insurance companies are the target of New York's zealotry today, their business may well be a target in the future. For the same reasons a person who might otherwise have joined one of these targeted organizations will decide not to do so. Just as in the compelled disclosure context, the government has acted here in a way that both invites and facilitates backlash against free association, and which may limit the ability of the NRA and its members freely to associate.

Finally, New York's actions here harm the interests of members and potential members of the NRA and similar groups by shrinking the effectiveness and reach of such groups and, if New York has its way, driving them out of business and out of the public square in New York entirely. If DFS's goal were realized, those in the state who wished to advocate for the Second Amendment would be unable to organize and operate effectively because they would be barred from banking and other financial services necessary to organize in the modern world.

"The right of the people to keep and bear arms", U.S. Const. amend. II, protected by the Second Amendment is not a "second-class right." *See McDonald v. Chicago*, 561 U.S. 742, 780 (2010). Neither is freedom of association.[16] The government of

[16] While Freedom of Association is not as vivid in the popular imagination as Freedom of Speech, the Court recognizes its importance in several contexts. Governments can violate the First Amendment's protection of Free Association by forcing a

New York here has treated both rights as if they were concessions. New York's officials should not be able to avoid judicial review.

II. This and Lower Courts' Existing Precedent Embodies the Principle that Efforts to Indirectly Circumvent the Constitution's Protections are Subject to Judicial Review Just as Direct Efforts to Violate Them.

Governments are "instituted among Men" to secure their individual rights to "life, liberty, and the pursuit of happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Yet government itself represents a significant danger to individual rights. According to James Madison, because men are not angels, "the great difficulty" in "framing a government" is that "[y]ou must first enable the government to controul the governed; and in the next place, oblige it to controul itself." The Federalist No. 51 at 290 (James Madison) (Clinton Rossiter ed., 1999). The Constitution, as amended by the Fourteenth Amendment, binds the authority of state

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group "to take in members it does not want," punishing individuals "for their political affiliation," denying benefits to members of an organization because of the organization's message or forcing organizations to disclose their membership. *Id*. (citing *United States Jaycees*, 468 U.S. at 623; *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion); *Healy v. James*, 408 U.S. 169, 181-182 (1972); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 462 (1958)). In *Americans for Prosperity Foundation*, the Court noted that the forced disclosure of member lists at issue in *NAACP v. Alabama* constituted a "chilling effect in its starkest form." *Id*. Here, too, the government's actions are likely to chill association in the state of New York.

officials in order to protect the rights with which individuals were endowed "by their Creator." *The Declaration of Independence* para. 2 (U.S. 1776). As the Founders would be unsurprised to learn, government officials today are seeking to remove, go around, or leap over the barriers erected by the Constitution. If such efforts are successful, the guarantees of the Constitution will be reduced to little more than "parchment barriers." The Federalist No. 48 at 276 (James Madison) (Clinton Rossiter ed., 1999).

"The Constitution deals with substance, not shadows," and its prohibition on the infringement of First Amendment rights ought to be "levelled at the thing, not the name." *Students for Fair Admissions v. Presidents and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (internal quotation marks omitted) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). This Court and lower courts have recognized limitations not only on overt and direct violations of the rights protected in the Constitution but also limitations on the government's ability to circumvent constitutional protections of individual rights.

A. This Court's and lower courts' precedent on racial discrimination in education makes clear that government actions that, in another context and aimed at a different purpose, might be legal, are nonetheless unconstitutional where it is clear those actions were directed at circumventing constitutional protections.

After this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), some school districts

attempted to avoid the consequences of that decision without creating an opportunity for judicial review. Virginia, for example, passed a law creating a "Pupil Placement Board" which had authority to determine which schools students would attend. *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 441 (E.D. Va. 1957) Relatedly, the law prohibited students' changing schools unless approved by the Board, which approval would be given only for good cause. *Id.* Clearly, then, the law was meant to maintain *de facto* segregation even as it had been recognized as unconstitutional. Striking down this policy, the Eastern District of Virginia wrote, "Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body." *Id.* at 442. Because the purpose of the law in question was to continue segregation in contravention of the Court's decision in *Brown*, the district court struck down the law.

Courts recognized this for what it was; an attempt to treat black students as second-class citizens despite the requirements of the Fourteenth Amendment's Equal Protection Clause. As this Court explained almost twenty years later:

> Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. "[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or

> state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

Gilmore v. Montgomery, Alabama, 417 U.S. 556, 568 (1974) (alteration in original) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)). Nor should government officials be able to stifle the core political activities of association and speech "through evasive schemes."

In this case, DFS engaged in what might constitute normal prosecutorial discretion in a different context. A state regulatory agency need not prosecute every potential violation of the law. What it cannot do is condition lenience in prosecution on the regulated entity's carrying out of the state's unconstitutional purpose. The words of Governor Cuomo and Superintendent Vullo make clear its purpose: the stifling of speech with which it disagrees. To avoid what would otherwise be a clear violation of the First Amendment, the New York Government has employed DFS to indirectly punish Second Amendment advocacy organizations and chill their future speech and association. Such use of third parties to accomplish what the government could not do directly is in principle no different than the stratagems employed by Virgnia that were intended to prop up segregation post-*Brown*. In both similar and disparate contexts, the Court and the Circuit Courts have recognized such action for the constitutional violation that it is.

B. This Court's and lower courts' precedent in other contexts make clear that government cannot enlist the help of third parties to accomplish what it otherwise could not.

The state cannot ask a third party to do what it could not do itself, nor may it use its regulatory power to bring about an end that it could not bring about directly. Lawfully, there can be no proxy war on constitutional rights. "The text and original meaning of [the First and Fourteenth] Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis in original) (citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality opinion); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U.S. 557, 566 (1995); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)). The barrier between state and private action created by the state-action doctrine "protects a robust sphere of individual liberty." *Manhattan Community Access Corp.*, 139 S. Ct. at 1928. Yet the First Amendment rights to free association and speech must be protected against crafty government action that seeks to abuse that robust private sphere. The will-no-one-rid-me-of-this-troublesome-priest approach is not a legitimate means of avoiding judicial review of unconstitutional actions.

In the Fourth Amendment context, courts have found that a suspect or defendant's constitutional rights may be violated even where the government is not the one directly carrying out the violation. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities."). As the 6th Circuit said, "[i]n the Fourth Amendment context, we have held that the government might violate a defendant's rights by 'instigating' or 'encouraging' a private party to extract a confession from a criminal defendant." *United States v. Folad*, 877 F.3d 250, 253 (6th Cir. 2017) (citing *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985)). In the Fifth Amendment context as well, "courts have held that the government might violate a defendant's right by coercing or encouraging a private party to extract a confession from a criminal defendant." *Id.* (citing *United States v. Garlock*, 19 F.3d 441, 443-44 (8th Cir. 1994)). Similarly, in the State Action context, government coercion or some forms of government encouragement intended to bring about a certain result can transform an otherwise private actor into an agent of the government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Thus, for example, the Fifth Circuit in *Missouri v. Biden*, found state action in federal officials sometimes successful efforts to have certain social media posts downgraded or removed. *Missouri v. Biden*, No. 23-30445 (5th Cir. Oct. 3, 2023).

In this case, the government of New York used its regulatory power and the influence that comes with that power to attempt to bring about an unconstitutional end. Not by persuasive argument but by direct threat, the government here sought to make business impossible in New York for the NRA. In the other contexts considered above, such an approach would at least trigger constitutional review. The NRA must have its case heard, not only for its own sake, but to prevent New York and other state governments from repeating what here would otherwise be a successful campaign to suppress constitutional rights.

III. The Government's Actions Here are not Mere Government Speech but Rather Constitute Government Action Directed at Undermining the NRA and Other Second Amendment Advocacy Groups' Rights.

Superintendent Vullo cannot hide behind the First Amendment in this case. Government speech does "not normally trigger the First Amendment Rules designed to protect the marketplace of ideas." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 559 (2005)). Rather, the "electoral process" is what "first and foremost provides a check on government speech." *Id.* (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)).

However, "the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Walker*, 576 U.S. at 208

(citing *Pleasant Grove v. Summum*, 555 U.S. 460, 468 (2009)). Similarly, "government speech must comport with the Establishment Clause," and "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice." *Summum*, 555 U.S. at 468. Here the government's speech is limited by the First Amendment's protection of free speech and association.

Finding that the speech in this case was protected as government speech, the Second Circuit found that the statements "did not refer to any pending investigations or possible regulatory action," and thus that there were no genuine threats. *NRA v. Vullo*, 49 F.4th at 717. Similarly, the court noted that the "statements did not 'intimat[e] that some form of punishment or adverse regulatory action [would] follow the failure to accede to the [] request' to discontinue arrangements with the NRA and other gun promotion organizations." *Id.* (alterations in original) (quoting *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)). This Court has repeatedly held that "the government can speak for itself." *Walker*, 576 U.S. at 208 (internal quotation marks omitted) (quoting *Southworth*, 529 U.S. at 229). However, DFS's speech here was not just the expression of its own message and was not directed at convincing New Yorkers that less freedom under the Second Amendment is preferable. Instead, it was directed at removing from the marketplace of ideas those pro-Second Amendment voices that would present the opposite position. It was both a threat and a call to action intended to bring about the weakening of organizations and speakers with opposing views.

Where, as here, the context makes clear that the government official in question has the authority to exercise regulatory power and has done so in the past under similar circumstances, the threat need not be explicit to have the effect of chilling association.

CONCLUSION

For these reasons, the Court should rule for the NRA and reverse the Second Circuit's decision.

Respectfully submitted,

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